Chicago-Kent Law Review

Volume 56 | Issue 3 Article 6

October 1980

A New Fourteenth Amendment: The Decline of State Action, Fundamental Rights and Suspect Classifications under the Burger Court

David F. Schwartz

A "NEW" FOURTEENTH AMENDMENT: THE DECLINE OF STATE ACTION, FUNDAMENTAL RIGHTS, AND SUSPECT CLASSIFICATIONS UNDER THE BURGER COURT

DAVID F. SCHWARTZ*

Headlines and great national debate greeted Warren Court decisions in areas such as race relations, legislative apportionment, and the rights of nonracial minorities. However, beneath the spotlight focusing on substantive questions, there existed a more significant procedural orientation toward providing certain interests with extraordinary judicial protection from hostile governmental action. In the broad areas of state action, fundamental rights, and suspect classifications, this orientation resulted in significant limits on state power.

During the 1970's, the Burger Court[1] demonstrated unmistakable hostility to what had become the traditional legal views in those three areas and thus severely eroded many limitations on state power. With *Flagg Brothers v. Brooks*,[2] the Court moved substantially away from what had been a constantly expanding view of state action. *Holt Civic Club v. City of Tuscaloosa*[3] completed a massive retreat from the doctrine of fundamental rights. In *Foley v. Connelie*[4] and *Ambach v. Norwick*,[5] the Court indicated that there was little vitality remaining in the concept of suspect classifications.

These decisions suggest that a radically different interpretation of the fourteenth amendment has emerged during the 1970's. This article will discuss the "new" state action as developed by the Supreme Court, the doctrine of fundamental rights, and suspect classifications. It will

* Assistant Professor of Government and Public Affairs at Southern Illinois University, Edwardsville, Illinois. B.A., State University of New York at Albany; M.A., Ph.D., Pennsylvania State University. The author wishes to express appreciation to the Graduate School of Southern Illinois University-Edwardsville for a research grant for the completion of this article.

1. The "Burger Court" characterization refers to the tenure of Chief Justice Warren Burger, which began in 1969 when Warren Burger replaced Earl Warren. In 1970, Harry A. Blackmun replaced Abe Fortas; in 1972, Lewis Powell and William H. Rehnquist replaced Hugo Black and John M. Harlan, respectively. John Paul Stevens replaced William O. Douglas in 1976. These five joined holdovers William J. Brennan, Thurgood Marshall, Byron White, and Potter Stewart to form the Burger Court.

2. 436 U.S. 149 (1978).

3. 439 U.S. 60 (1978).

4. 435 U.S. 291 (1978).

5. 441 U.S. 68 (1979).

be shown that the Supreme Court has seriously impaired these three important mechanisms designed to protect civil rights.

STATE ACTION

Retreat from the Civil Rights Cases: The "New" State Action

One of the more fascinating chapters in American constitutional law has been the Supreme Court's effort to release the fourteenth amendment from the confines of the *Civil Rights Cases*.[6] That decision's rather stark public-private dichotomy[7] seemed to limit the amendment's application to situations in which a state was foolish enough to openly deny due process and equal protection. This meant that when states, whether for reasons of conscience or guile, began to curtail discriminatory activity, the private sector was both willing and constitutionally able to fill the void.[8] There seemed to be no reason why a state could not simply delegate to private parties any activity it wished to immunize from federal scrutiny. As long as private discrimination remained immune from federal due process and equal protection requirements, the fourteenth amendment was at best marginally relevant to the most consequential invidious discriminations.

Judicial hostility to this "silver platter" concept of state neutrality or inaction[9] surfaced as early as the 1940's. Although it was unwilling to overrule the *Civil Rights Cases*, the Court revitalized the fourteenth

6. 109 U.S. 3 (1883).

7. The Court invalidated the public accommodations sections of the Civil Rights Act of 1875, ch. 114, § 5, 18 Stat. 337 (1875) (repealed 1948), reasoning that since the fourteenth amendment refers directly to the states, congressional power to enforce the amendment could reach state but not private action.

> Individual invasion of individual rights is not the subject-matter of the amendment. . . . [The fourteenth amendment] does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws . . . when these are subversive of the fundamental rights specified.

109 U.S. at 11.

8. *Compare, e.g.*, the Texas white primary cases of Nixon v. Herndon, 273 U.S. 536 (1927) (state law limiting primary election participation to whites is denial of equal protection) *and* Nixon v. Condon, 286 U.S. 73 (1932) (state authorization to political party's executive committee to prescribe primary election eligibility requirements is state action when committee limits primary voting to whites) *with* Grovey v. Townsend, 295 U.S. 45 (1935) (state party convention resolution limiting primary election participation to whites *not* state action since political party is private group not amenable to fourteenth amendment restrictions). *Grovey* was later overruled by Smith v. Allwright, 321 U.S. 649 (1944).

9. Purposeful state noninvolvement designed to allow others to do what the state cannot constitutionally do is reminiscent of the silver platter doctrine in search and seizure law. This notion allowed federal officials to nominally stay within the Court's exclusionary rule, *see* Weeks v. United States, 232 U.S. 383 (1914), by turning over unconstitutionally seized evidence to state officials on a "silver platter" for use in state court. The Court closed this loophole in 1961, *see* Mapp v. Ohio, 367 U.S. 643 (1961), much as Smith v. Allwright, 321 U.S. 649 (1944), began to close the state neutrality/inaction loophole.

amendment by expanding the definition of state action very nearly to the point suggested by Justice Harlan's dissent in the *Civil Rights Cases*.[10] Thus, private conduct could be brought within the fourteenth amendment if even a trace of a symbiotic relationship existed between private actors and the state.

With *Smith v. Allwright*,[11] *Marsh v. Alabama*,[12] and *Shelley v. Kramer*,[13] the public-private dichotomy so crucial to the *Civil Rights Cases* began to blur. In each of these cases, the Court found that the conduct of ostensibly private individuals and the use of facially neutral state power was proscribed by the fourteenth amendment when the conduct or power placed the state on the side of those who denied due process or equal protection.

While these early decisions established definite movement away from the holding in the *Civil Rights Cases*, the Warren Court's role is still noteworthy. Such decisions as *Burton v. Wilmington Parking Authority*,[14] *Evans v. Newton*,[15] *Reitman v. Mulkey*,[16] and *Amalgamated*

10. "In every material sense applicable to the practical enforcement of the fourteenth amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents of the state, because they . . . are amenable, in respect of their public duties and functions, to government regulation." 109 U.S. at 58-59 (Harlan, J., dissenting).

11. 321 U.S. 649 (1944). In this case, and later in Terry v. Adams, 345 U.S. 461 (1953), the Court held that when a state in the past has controlled primary elections and the primary election is a vital part of the electoral process in that state, the conduct of that primary election involved state action even where there was no overt or direct state action.

12. 326 U.S. 501 (1946). The Court invalidated the trespass conviction of a Jehovah's Witness for distributing religious literature in a company-owned town. *Id.* at 17-18. While a state could permit private individuals or entities to own and control municipalities, and while the state's general police power to punish trespassing was acknowledged, the state could not use its facially neutral power to punish those who asserted first amendment rights in company towns. Like the elections in *Terry* and *Allwright*, control of municipalities remained a state function regardless of a state's internal policies so that the private supervisors are under the same fourteenth amendment constraints as the state would have been. *See* note 11 *supra*.

13. 334 U.S. 1 (1948). Here, the Court held that when property owners entered into racially restrictive covenants, this was precisely the type of private conduct that the Civil Rights Cases, 109 U.S. 3 (1883), held was immune to fourteenth amendment restrictions. However, when the property owners sought to enforce the terms of the covenant in state courts, and when the state courts vindicated the discriminators, the state then became a partner in racial discrimination, which the fourteenth amendment prohibits. *Shelley* raised an interesting philosophical question that was never really resolved: If private individuals may discriminate as invidiously as they wish, and if the state may tolerate but not assist in the discriminatory conduct, is it a logical outgrowth of this situation that individuals must resort to self-help in vindicating their right to discriminate? The passage of title II of the Civil Rights Act of 1964, *see* note 20 *infra*, to a large extent mooted this question. *But see* the debate between Justices Black and Douglas in Bell v. Maryland, 378 U.S. 226 (1964).

14. 365 U.S. 715 (1961). The Court found that a forbidden symbiotic relationship existed between a private actor and the state. Since the Eagle Coffee Shoppe, which served only whites, derived great benefit to its business from renting space in the municipal parking garage, and since the state derived benefit from its association with Eagle, defraying expenses by leasing space to the coffee shop, Eagle's discrimination became Delaware's policy for fourteenth amendment purposes.

Food Employees Union v. Logan Valley Plaza[17] not only embraced but represented the apex of the new state action. By 1968, virtually every conceivable private activity could be linked, however tenuously, with the state and thus brought within the fourteenth amendment's scope.

While no doubt a distortion of the constitutional system envisioned in the *Civil Rights Cases*,[18] the new state action filled a void in federal civil rights protection which had existed since 1883. However, two subsequent developments seemed likely to either halt any further expansion of the state action doctrine or to foreshadow a rollback of judicial activism in cases where the links between private conduct and the state were the most tenuous. Paradoxically, the first development preceded the new state action when the Supreme Court, in the 1930's, acceded to the massive expansion of national power under the commerce clause.[19] However, it was not until passage of the Civil Rights Acts of 1964[20] and 1968[21] that Congress fully used its power to remove

15. 382 U.S. 296 (1966) (*Evans I*). In *Evans I*, a will conveyed land to the city for use as a park for whites only. Apparently realizing the state action implications, city officials resigned as trustees and state courts appointed private citizens to carry out the will. The Court held that the act of appointing trustees was forbidden state action, since the park had become an integral part of city life, so that the city was involved in its operation regardless of the nominal trustees. *But see* Evans v. Abney, 396 U.S. 435 (1970) (*Evans II*), where, on remand of *Evans I*, the Georgia courts held that the land conveyance must fail because its racially discriminatory provisions could not be carried out without forbidden state action. Therefore, the land reverted to the estate. The Court permitted the conveyance to fail, refusing to accept the argument that state court involvement in a reversion necessitated by racial discrimination made the state a partner in the discrimination.

16. 387 U.S. 369 (1967). This case probably represents the furthest erosion of the *Civil Rights Cases*. The Court struck down an amendment to the California Constitution repealing the state's fair housing laws. While purporting to acknowledge that states were under no federal obligation to pass fair housing laws and that states were generally free to repeal laws they thought unwise, the Court nevertheless held the repeal here tantamount to an affirmative state authorization for housing discrimination.

17. 391 U.S. 308 (1968). As in Marsh v. Alabama, 326 U.S. 501 (1946), the Court found the shopping center to be an essentially public place and voided an injunction designed to prevent picketing there. While the state could permit private individuals to own and control public areas, the state could not vindicate the private owner's desire to restrict the first amendment freedoms of those to whom the mall was otherwise open.

18. 109 U.S. 3 (1883). *See* note 6 *supra* and accompanying text.

19. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Corp., 301 U.S. 1 (1937). In these cases, the Court redefined the concept of "direct effect" and held that the commerce power extended to local activities far removed from interstate commerce when those activities had a substantial or potentially substantial effect on interstate commerce. *See also* Edwards v. California, 314 U.S. 160 (1941), in which the Court held that the movement of people as well as commodities across state lines was subject to the commerce power. This meant that Congress could remove impediments to travel, such as discrimination in public accommodations, whether or not a state was involved.

20. Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447 (1976)). The most important provisions of the act are titles II and VII, which prohibit discrimination in places of public accommodation and in employment, respectively. In Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), the Court upheld title II as a permissible exercise of the commerce power. Congress thus was able to accomplish in 1964 almost precisely what it could not accomplish in 1875, *see* note 7 *supra*, despite the absence of any relevant constitutional change.

barriers to the free flow of interstate commerce as a means to reach discriminatory private action. This new commerce power appeared to render the new state action a more circuitous and largely superfluous method of dealing with private discrimination. Since Congress had taken the initiative, there was no longer the pressing need for judicial innovation which had existed in the 1940's.[22]

The second development was the change in the Supreme Court's membership after 1969. The Burger Court, arguably more sympathetic to state governmental power than to minority claims for added judicial protection, seemed unlikely to expand or even to perpetuate the new state action. Thus, the equation combining judicial restraint with the possibility for congressional activism in the civil rights area yielded a dubious prognosis for the new state action's vitality.

Flagg Brothers v. Brooks and the "Mere Acquiescence" Doctrine

The transition to the Burger Court did not result in outright rejection of the new state action. However, beginning in 1972 and reaching a climax in *Flagg Brothers v. Brooks*[23] in 1978, the Court's decisions represent an unmistakable and nearly total rejection of the new state action, eroding most of the Warren Court's activism in this area.

In *Moose Lodge v. Irvis*,[24] the Court held that a private club's racially motivated refusal to serve a member's guest was not transmuted to forbidden state action because the club possessed a liquor license. In *Lloyd Corp. v. Tanner*,[25] the Court decided that a privately-owned shopping mall's refusal to allow the distribution of antiwar leaflets retained the cloak of private conduct despite the general public's access to the mall. In *Jackson v. Metropolitan Edison Co.*,[26] the Court found, despite the state's massive regulatory involvement, that a utility's termination of service without notice or opportunity to be heard was not state action.

While purporting to distinguish rather than overrule the expansive

21. Pub. L. No. 90-284, 82 Stat. 73 (codified at 42 U.S.C. § 3601 (1976)). The Act of 1968 deals in part with discrimination in the sale or rental of housing and other property.

22. Under the "new" commerce power, Congress could directly regulate private conduct without the need to link private conduct with the state through judicial acrobatics, although congressional as well as judicial acrobatics were often needed to link private activity with interstate commerce. To the extent that a private activity could not be linked with interstate commerce, which was virtually unimaginable after 1941, or if Congress did not choose to deal with a certain type of discrimination, the new state action could still be useful.

23. 436 U.S. 149 (1978).

24. 407 U.S. 163 (1972).

25. 407 U.S. 551 (1972).

26. 419 U.S. 345 (1974).

state action cases,[27] the Court's emphasis and direction in these three decisions was clear. Despite the Court's contrary assertion,[28] the presence of a symbiotic relationship between the club and the state in *Irvis* was even more pronounced than that in *Burton v. Wilmington Parking Authority*;[29] *Lloyd* seemed to ignore the entire public access concept on which *Marsh v. Alabama*[30] was based; and *Jackson* suggested a public-private dichotomy so extreme that one would be hardpressed to find anything that was truly state action.[31] Regardless whether the Court was motivated by a desire to restore a more meaningful balance be-

27. There was, however, one casualty: Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), was soon distinguished out of existence. *See* note 30 *infra*.

28. According to the Court, in *Moose Lodge* "there is nothing approaching the symbiotic relationship between lessor and lessee that was present in *Burton*. . . . In short, while Eagle was a public restaurant in a public building, Moose Lodge is a private social club in a private building." 407 U.S. at 175. This is a most bizarre statement; the first part seems clearly wrong, the second plainly irrelevant. Certainly, an integral part of Moose Lodge's attractiveness as a private club was its possession of a liquor license, and the lodge hence derived great benefit from its relationship with the state. Moreover, the pervasiveness of liquor license regulation intertwines the state and licensee to a far greater extent than does the lease of space in a municipal building, as in *Burton*, which requires little more than minimal landlord-tenant dealings. Thus, the Court was correct in holding that *Moose Lodge* was distinguishable from *Burton*, but the distinction is that there was more, not less, state involvement in the former than in the latter. The Court supposedly did not consider the packaging in which the state's involvement was couched in Smith v. Allwright, 321 U.S. 649 (1944). Thus, where an activity occurred, in a public or private building, cannot be dispositive of the fourteenth amendment's applicability.

29. 365 U.S. 715 (1961).

30. 326 U.S. 501 (1946). The basis for *Marsh* was that a state cannot escape constitutional involvement when it allows private individuals to open property to the public while refusing to recognize constitutional rights the public normally enjoys. *See* note 12 *supra*. However, this is precisely what the Court sanctioned in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). The contention that "the owner of the company town [in *Marsh*] was performing the full spectrum of municipal power and stood in the shoes of the State [whereas in *Lloyd*] there is no comparable assumption . . . of municipal functions or power," *id.* at 569, exalts form over substance. Clearly, Lloyd Corp. was never under any obligation to open its property to the public. Once the property was opened, however, *Marsh* means that the state cannot vindicate the owner's reluctance to tolerate the public's exercise of first amendment freedoms.

The attempt in *Lloyd* to distinguish *Logan Valley Plaza* would have been more honest had the Court overruled *Marsh*. However, in Hudgens v. NLRB, 424 U.S. 507 (1976), the Court instead opted to overrule *Logan Valley Plaza* while allegedly leaving *Marsh* intact. *Hudgens* held that fourteenth amendment restrictions apply only where private property is used in such a way as to become "the functional equivalent of a municipality." *Id.* at 520. This logic does little more than limit *Marsh* to its facts, leaving it virtually devoid of substance.

31. *Jackson* introduced two elements which would further erode the new state action. First was the concept of exclusive sovereign prerogatives. Since states, for the most part, are not entrepreneurs in the utility business, that business is not an exclusive prerogative. Thus, a state is not necessarily implicated when the utility company it has authorized to operate and whose operations it directs acts in a manner in which the state itself could not constitutionally act. Closely related to this notion of exclusivity is the concept of mere acquiescence. This means that as long as the state does not require a private company to act in a manner in which the state could not, the state's approval of that action is constitutionally irrelevant. In *Jackson*, since it was the company's idea to terminate service without notice or opportunity to be heard, the state's approval "does not transmute a practice initiated by the utility and approved by the commission into 'state action.' " 419 U.S. at 357. The exclusive prerogative and mere acquiescence doctrines of *Jackson* played a key role in Flagg Bros. v. Brooks, 436 U.S. 149 (1978). *See* text accompanying notes 42-61 *infra*.

tween things public and things private, hostility to the specific interests seeking protection, or a posture of judicial restraint that looks to Congress to remedy deprivations of rights, *Irvis, Lloyd*, and *Jackson* were as much a return to the *Civil Rights Cases*[32] as *Burton*,[33] *Evans*,[34] *Reitman*,[35] and *Logan Valley Plaza*[36] were a retreat.

The apex of the new state action's demise came in the area of debtors' and creditors' rights, paradoxical in that the Court's initial decisions were sympathetic to the debtor insofar as maximizing procedural protection. Thus, in *Sniadach v. Family Finance Corp.*,[37] *Fuentes v. Shevin*,[38] *Mitchell v. W.T. Grant Co.*,[39] and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[40] although sharply divided over the sufficiency of various notice and hearing schemes, the Court never questioned the applicability of the due process clause to these private disputes.[41]

However, in *Flagg Brothers v. Brooks*,[42] where the state at least nominally opted out of one phase of debtor-creditor relations, the tables turned dramatically. New York permitted warehouse owners to sell stored goods in order to satisfy delinquent storage fees. The statute required no opportunity to be heard by the debtor and Flagg Brothers did no more than inform Brooks by mail that her possessions would be sold if payment was not made. Brooks complained that she was being overcharged; however, the law provided no remedy other than replevin, which required posting a surety bond that she could not afford. Brooks argued that the statutory authorization to sell without the need for a hearing was a denial of due process.[43]

In a five to three decision, the Court upheld the New York law. The Court's reasoning relied heavily on the *Jackson* notions of exclusive prerogatives and mere acquiescence,[44] but the decision was essen-

32. 109 U.S. 3 (1883); *see* discussion in text at notes 6-8 *supra*.
33. *See* note 14 *supra*.
34. *See* note 15 *supra*.
35. *See* note 16 *supra*.
36. *See* note 17 *supra*.
37. 395 U.S. 337 (1969).
38. 407 U.S. 67 (1972).
39. 416 U.S. 600 (1974).
40. 419 U.S. 601 (1975).
41. The key issue in each of the four cases was at what stage in proceedings to freeze wages or repossess property the debtor was constitutionally assured of an opportunity to be heard.
42. 436 U.S. 149 (1978). As the Court noted: "The constitutional protection attaches not because, as in *North Georgia Finishing*, a clerk issued a ministerial writ . . . but because as a result of that writ the property of the debtor was seized and impounded by the affirmative command of the law of Georgia." *Id.* at 160-61 n.10. As in Shelley v. Kramer, 334 U.S. 1 (1948), a state is not permitted to use its power to vindicate the rights of those who would deny due process.
43. 436 U.S. at 153.
44. Brooks had been evicted from her apartment and had placed her possessions in storage.

tially based on one crucial premise: The warehouse owner's sale of the goods did not involve any action by the state. Hence there was no fourteenth amendment violation. While admitting that the contemplated sale of goods was normally executed by the sheriff, the Court held that only exclusive prerogatives of sovereignty such as conducting elections or supervising municipalities were so committed to the state that they remained state functions even when delegated to private individuals. Selling stored goods was held not an exclusive prerogative of sovereignty, so the state could abdicate responsibility. In the Court's view, the decision did nothing more than recognize "the traditional place of private arrangements in ordering relationships in the commercial world."[45] The state's mere acquiescence in conduct which would have been unconstitutional if done by the state was not state action, but rather inaction:

> Indeed, the crux of respondents' complaint is not that the State *has* acted, but that it has *refused* to act. This statutory refusal to act is no different in principle from an ordinary statute of limitations whereby the State declines to provide a remedy for private deprivations of property after the passage of a given period of time.[46]

Little remains of the new state action after *Flagg Brothers*, and the Court's reasoning is assailable on several grounds. First, it is neither logically nor legally accurate to define state involvement in facially private activity in terms of the activity's exclusivity. Exclusivity is an essentially meaningless description of power. Technically, there are aspects of its power that a state may not delegate;[47] however, for all practical purposes, a state may give away anything under the proviso that for federal constitutional purposes the state retains responsibility

New York authorized the warehouse owner to sell the goods, after notification, in a commercially reasonable manner and endeavored to define commercially reasonable. Brooks responded to the notice of the warehouse's intent to sell by filing suit in federal court to recover damages under 42 U.S.C. § 1983 (1976), which depends upon state action. The district court dismissed the suit, holding that under Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the warehouse owner's action was not state action. The court of appeals reversed, finding that, even under *Jackson*, functions normally associated with the state such as the contemplated sale of goods (even though formerly done by the sheriff) remained state functions when delegated to others.

45. 436 U.S. at 160.

46. *Id.* at 166 (emphasis in original). "This Court . . . has never held that a State's mere acquiescence in a private action converts that action into that of the State. . . . [T]he State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State . . . permits but does not compel. . . ." *Id.* at 164-65.

47. For example, the Court has held that a state is not constitutionally able to contract away its eminent domain or police powers, *see* Pennsylvania Hosp. v. Philadelphia, 245 U.S. 20 (1917) *and* Stone v. Mississippi, 101 U.S. 814 (1880), respectively. These cases illustrate that the notions of exclusivity and delegation are largely meaningless since, in each case, the state actually delegated the non-delegatable power. The proper principle is that the state can reclaim certain of its powers and nullify effects of the delegation. The same would be true if the state were to delegate its so-called exclusive powers of conducting elections and supervising municipalities.

for the conduct of functions delegated to private parties. It makes little sense to cite *Marsh* and *Allwright* as illustrative of the exclusivity principle, as the majority does in *Flagg Brothers*.[48] In both of those cases, the Court *sanctioned* the delegation of power over elections and municipalities while holding the state responsible for the manner in which the power was exercised. If it is permissible to delegate a power, it is hardly logical to characterize the delegated power as exclusive.

Second, after *Flagg Brothers*, it is difficult to imagine what constitutes an exclusive function, other than conducting elections and supervising municipalities. It could be argued that providing security against the forcible transfer of property is a function that is at the core of a state's existence.[49] By allowing New York to evade responsibility for the private action in *Flagg Brothers*, the Court trivialized those functions it proclaimed to be exclusive. There is no point in strictly scrutinizing the conduct of elections and the supervision of municipalities if the officials chosen at those elections and the officials who supervise the municipalities are permitted to simply delegate the preservation of order in the community to unaccountable private individuals. To argue that New York's decision is an example of democracy and federalism at work misses the point that the fourteenth amendment was designed to remove various policy options from the states.

Third, any definition of state action that equates the absence of overt involvement with the absence of a fourteenth amendment question permits precisely what *Allwright* sought to prohibit: purposeful state non-involvement designed to immunize a particular activity from fourteenth amendment challenge.[50] The majority had no satisfactory

48. 436 U.S. at 158-59. The Court argued that while the Texas primary was the only meaningful election and the Chickasaw streets were the only streets, the analogy was not applicable to Brooks, since she was not doomed to have her property sold. Rather, she could resort to New York's replevin procedure, which required posting a surety bond. Possession of a cash reserve for such exigencies, however, is not normally associated with the victims of eviction and forced sale of goods. Thus, replevin was no remedy for Brooks at all.

49. "The power to order legally binding surrenders of property and the constitutional restrictions on that power are necessary correlatives in our system. In effect, today's decision allows the State to divorce these two elements by the simple expedient of transferring the implementation of its policy to private parties." *Id.* at 178-79 (Stevens, J., dissenting). That the state might be forever implicated in property transfers of this kind simply because it had once elected to supervise them may sound harsh, but it is the exact principle established in Reitman v. Mulkey, 387 U.S. 369 (1967).

50. *See* note 11 *supra*. The Court maintained that the "total absence of overt official involvement plainly distinguishes this case from earlier decisions. . . . " 436 U.S. at 157. Such a statement is a triumph of form over substance. The Court admitted that state action is more than a mechanical or ministerial concept of literal involvement in a controversy by someone who works for the government; rather, state action is to be viewed in terms of where the power and prestige of

response to the charge that, given its logic in *Flagg Brothers*, it was not evident that a state could not "authorize the warehouseman to retain all proceeds of the lien sale even if they far exceed the amount of the alleged debt . . . authorize finance companies to enter private homes to repossess merchandise . . . [or] authorize 'any person with sufficient physical power' to acquire and sell the property of his weaker neighbor."[51] While it may be tempting to argue that such direct authorization as in those examples would clearly constitute state action, it should be noted that the scheme upheld in *Flagg Brothers* emanated from direct legislative authorization to the warehouse owner.[52]

Finally, the existence of a symbiotic relationship between private conduct and the state, which had been the *sine qua non* of the new state action, was curiously ignored by the Court in *Flagg Brothers*. In the same fashion as did the restaurant in *Burton*,[53] the warehouse in *Flagg Brothers* derived great benefit from New York's abdication, enabling the company to "free up its valuable storage space"[54] without regard to the bothersome legal procedures seemingly mandated by *Sniadach v. Family Finance Corp.*,[55] *Fuentes v. Shevin*,[56] *Mitchell v. W.T. Grant*

the state is placed. *See* note 42 *supra*. Yet, in *Flagg Bros.*, precisely as in the debtors' rights cases, *see* notes 37-41 *supra* and accompanying text, the power of the state was clearly placed in support of those who would deny due process.

51. 436 U.S. at 170 (Stevens, J., dissenting).

> An attempt to challenge the validity of any such outrageous statute would be defeated by the reasoning the Court uses today: The Court's rationale would characterize action pursuant to such a statute as purely private action, which the State permits but does not compel, in an area not exclusively reserved to the State.

Id.

The Court responded: "Unlike the parade of horribles suggested by . . . [the] dissent . . . this case does not involve state authorization of private breach of the peace." *Id.* at 160 n.9. However, *Flagg Bros.* involved state authorization of private denials of due process, as did the Stevens examples.

52. Whether termed "traditional," "exclusive," or "significant," the state power to order binding, nonconsensual resolution of a conflict between debtor and creditor is exactly the sort of power with which the Due Process Clause is concerned. And the State's delegation of that power to a private party is, accordingly, subject to due process scrutiny . . . . The focus is not on the private deprivation but on the state authorization. . . . The State's conduct in this case takes the concrete form of a statutory enactment, and it is that statute that may be challenged.

Id. at 176 (Stevens, J., dissenting).

53. *See* notes 14 and 29 *supra*.

54. 436 U.S. at 162 n.12. This rather casual remark appeared in the *majority* opinion. Incredibly, the Court mentioned in the same footnote that "New York's statute has done nothing more than authorize . . . what Flagg Brothers would tend to do, even in the absence of such authorization . . . ." *Id.* This statement ignored the fact that Flagg Brothers' tendency would be illegal without express state authorization. The fact that common law might have recognized the warehouse owner's right to sell under certain delinquency circumstances is irrelevant insofar as the due process clause is concerned. However, the Court then proceeded to make the due process clause irrelevant!

55. 395 U.S. 337 (1969).

56. 407 U.S. 67 (1972).

Co.,[57] and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[58] Indeed, *Flagg Brothers* rendered those debtors' rights cases largely irrelevant, since a state now would be foolish to expose its commercial practices to federal scrutiny when withdrawal from the field in favor of private action is perfectly permissible.[59]

Flagg Brothers made clear that the state action doctrine had changed dramatically in only ten years, even though only one case was overruled.[60] At this time, it would not be warranted to say that the Court has returned to its stance in 1883. However, it is evident that there is now a *new* new state action, which has rolled back what the Burger Court obviously considers to be excessive restraints on state power. Whether the new orientation in this area is wise presents a normative question. However, to the extent that a state is not responsible for what might be unjustified property transfers or can fulfill its responsibility by providing only a post-hoc procedure that might not be a viable remedy for the victim, Justice Marshall's accusation that *Flagg Brothers* shows "an attitude of callous indifference to the realities of life for the poor"[61] is difficult to refute.

FUNDAMENTAL RIGHTS

The doctrine of fundamental rights, like the new state action, reduced state power by creating a category of interests and activities which was virtually immune to governmental infringement. Similar to its strategy in the state action area, the Burger Court first moved to

57. 416 U.S. 600 (1974).

58. 419 U.S. 601 (1975). Since the majority in *Flagg Bros.* found no state action, it correctly did not inquire into whether New York's procedure would have been sufficient under the due process clause had there been state action. The dissent assumed "*arguendo*, that the procedure to be followed would be inadequate if the sale were conducted by state officials. . . ." 436 U.S. at 169 (Stevens, J., dissenting). Under the debtors' rights cases, the absence of a pre-sale hearing almost certainly would have been fatal to New York's law had a due process inquiry been reached.

59. [T]he very defect that made the statutes in *Shevin* and *North Georgia Finishing* unconstitutional—lack of state control—is, under today's decision, the factor that precludes constitutional review of the state statute. The Due Process Clause cannot command such incongruous results. If it is unconstitutional for a State to allow a private party to exercise a traditional state power because the state supervision of that power is purely mechanical, the State surely cannot immunize its actions from constitutional *scrutiny* by removing even the mechanical supervision. . . .

Not only has the State removed its nominal supervision in this case, it has also authorized a private party to exercise a governmental power that is at least as significant as the power exercised in *Shevin* or *North Georgia Finishing*.

436 U.S. at 175 (Stevens, J., dissenting) (emphasis in original).

60. *See* note 30 *supra*. The Court's heavy reliance in *Flagg Bros.* on Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), and Moose Lodge v. Irvis, 407 U.S. 163 (1972), is revealing, since those cases departed so extremely from the pre-1970 state action decisions.

61. 436 U.S. at 166 (Marshall, J., dissenting).

contain any expansion of the list of fundamental rights and has now begun to dismantle the fundamental rights concept.

Important Rights and Two-Tiered Scrutiny

As with state action, the Warren Court is sometimes incorrectly perceived as the architect of both the fundamental rights doctrine and its attendant strict judicial scrutiny. While it is clear that the Warren Court embraced and expanded the doctrine, the notion of a hierarchy of rights entitled to extraordinary judicial protection predated the Warren Court. The footnote in *United States v. Carolene Products Co.*[62] suggested that there existed an implicit constitutional recognition that some rights were more important than others and that different levels of analysis were appropriate depending on what rights were involved.[63] In *Kovacs v. Cooper*,[64] the Court acknowledged that first amendment freedoms occupied a preferred status, and in *Skinner v. Oklahoma*,[65] the Court labeled procreation fundamental.

While terminology often varies[66] and disputes frequently arise, the Warren Court arguably elevated education,[67] voting,[68] marriage,[69]

62. 304 U.S. 144 (1938).

63. There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny. . . .

Id. at 152-53 n.4.

64. 336 U.S. 77 (1949). While this acknowledgement was made in a plurality opinion, *id.* at 88, three dissenters, Justices Black, Douglas, and Rutledge, seemed to accept the preferred notion but disputed the way in which it was applied. Thus, a clear majority accepted the doctrine.

65. 316 U.S. 535 (1942).

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. . . . [S]trict scrutiny of the classification a State makes in a sterilization law is essential, lest unwittingly or otherwise, invidious discriminations are made. . . .

Id. at 541.

66. Unfortunately, the Court has never been very systematic with regard to adjectives used to modify things fundamental and things not fundamental. Thus, words such as "important," "substantial," "significant," and "overriding" are often used interchangeably but sometimes trigger different standards of review.

67. In Brown v. Board of Educ., 347 U.S. 483 (1954), the Court did not use the word "fundamental." Yet, given the opinion's characterization of education, it would be difficult to arrive at a conclusion other than that education became a fundamental right, at least when the state elects to provide it at all:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493.

marital privacy,[70] and interstate travel[71] to fundamental status. The label is much more than a semantic exercise. Courts normally presume that governmental actions are constitutional.[72] This presumption places on the challenger the burden of proving either that the government does not possess a legitimate interest in the action it has taken or that the action is not a rational method of fulfilling that interest.[73] However, when government infringes a right the Court has labeled fundamental, the burden of proof shifts. Government must then prove that the infringement is motivated by a compelling interest[74] that cannot be achieved without infringing that fundamental right.[75] While this strict judicial scrutiny does not require that every intrusion on a fundamental right be held unconstitutional, significantly, "the Warren Court never found a state measure sufficiently compelling to override anything it deemed fundamental."[76] As the list of fundamental rights

68. In Reynolds v. Sims, 377 U.S. 533 (1964), the Court held that to the extent a state conducts elections, "the right of suffrage is a fundamental matter in a free and democratic society [and] is preservative of other basic civil and political rights, [so that] any alleged infringement . . . [must] be carefully and meticulously scrutinized." *Id.* at 561-62.

69. *See* Loving v. Virginia, 388 U.S. 1 (1967). "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.* at 12.

70. In Griswold v. Connecticut, 381 U.S. 479 (1965), a plurality found "the right of privacy in marriage" to be "basic and fundamental and so deep-rooted in our society." *Id.* at 491 (Goldberg, J., concurring).

71. "This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited. . . ." Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

72. "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

73. This type of inquiry is known as minimal scrutiny, and it is as difficult for a law to be invalid under minimal scrutiny as it is for a law to be valid under strict scrutiny. *See* note 75 *infra*. "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. . . . The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long since been discarded." Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963).

74. Alternatively, the intensity of the government's interest is referred to as "important," "substantial," "significant," or "over-riding." *See* note 66 *supra*.

75. Under this alternative means criterion, while pursuing its compelling interest, "the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity." Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

76. Mendelson, *From Warren to Burger: The Rise and Decline of Substantive Equal Protection*, 66 AM. POL. SCI. REV. 1226, 1227 (1972). Mendelson's assertion is somewhat overstated. In United States v. O'Brien, 391 U.S. 367 (1968), the Court held that the maintenance of an orderly selective service system was compelling and that an individual's possession of his registration certificate was necessary to fulfill this interest, so that the government could punish an individual for destroying the certificate even though such punishment infringed upon symbolic speech. *See* text accompanying note 64 *supra*. Nevertheless, the statement is an accurate reflection of the Warren Court's overall posture in this area.

grew, state power correspondingly declined—an equation that summarizes the trend under the Warren Court.

The "Implicit/Explicit Protection" Doctrine

As with the new state action, the Burger Court's hostility to the fundamental rights doctrine soon became apparent. In *Dandridge v. Williams*,[77] the Court pointedly asserted that "state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights"[78] is to be judged under the more lenient rational basis standard.[79] *Dandridge*'s significance is two-fold. First, the aid plan the Court approved could have a drastic effect on a large family's survival, a circumstance that makes welfare at least *seem* fundamental.[80] The decision to apply minimal scrutiny therefore suggests a desire to avoid extending the fundamental rights doctrine to an arguably logical candidate for fundamental status. Second, and even more significant, *Dandridge* suggests that in order to be fundamental, a right must be enumerated in the Bill of Rights.[81] While the decision sanctioned the existence of the fundamental rights doctrine, the seemingly requisite Bill of Rights linkage would virtually erase every fundamental right that previously had been "discovered."[82]

However, the decisions in *Boddie v. Connecticut*[83] and *Dunn v. Blumstein*[84] demonstrated the Court's willingness to tolerate the status quo in the fundamental rights area. In *Boddie*, the Court held that access to a divorce court regardless of ability to pay costs and fees was either itself a fundamental right or a necessary concomitant of the fundamental right of marriage.[85] In *Dunn*, the Court invalidated lengthy

77. 397 U.S. 471 (1970).

78. *Id.* at 484. This statement indicates both that minimal scrutiny will be used and that welfare is not a fundamental right. *See* notes 73-75 *supra*.

79. *Id.*

80. The challenged state law placed an upper limit on the total amount of aid a family could receive. Curiously, in the same year, the Court also decided Goldberg v. Kelly, 397 U.S. 254 (1970), holding that due process required a pretermination hearing for welfare recipients because "welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . [T]ermination of aid . . . may deprive . . . the very means by which to live . . . ." *Id.* at 264. If a governmental policy that affects the ability to live does *not* merit strict scrutiny, it is difficult to make a rational argument for what *should* be strictly scrutinized.

81. *See* note 78 and accompanying text *supra*.

82. Freedom of speech would continue to be fundamental under this definition, *see* note 64 *supra*, but none of the others in notes 67-71 *supra* would be. However, the Court soon found a loophole, *see* text accompanying note 90 *infra*, that for a while kept the Warren Court's list intact.

83. 401 U.S. 371 (1971).

84. 405 U.S. 330 (1972).

85. Language in the opinion supports either position:

> [M]arriage involves interests of basic importance in our society. . . . Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts,

residency requirements which exerted a chilling effect on the fundamental rights of voting and interstate travel.[86] In its early stages, then, it appeared that while the Burger Court was adamantly opposed to expanding the list of fundamental rights, it was not inclined to pare the list that existed.[87]

The key decision of *San Antonio Independent School District v. Rodriguez*[88] suggested that this tolerance of the status quo was short-lived. In upholding Texas' school finance method, the Court adopted, with a slight modification, the fundamental rights definition suggested in *Dandridge*:[89] An activity's social importance alone is irrelevant in determining whether a right is fundamental. Rather, the rights entitled to the extraordinary protection of strict judicial scrutiny are those explicitly or implicitly guaranteed by the Constitution.[90] "Education, of course, is not among the rights afforded explicit protection under [the] Constitution. Nor do we find any basis for saying it is implicitly so protected."[91] This meant that a state's policy of financing education had to survive only minimal scrutiny.[92] In order to avoid the ines-

> for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. . . . [D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

401 U.S. at 376-77.

86. The Court accepted as compelling the state's goal of limiting the franchise to bona fide residents. But the Court held that making one year the benchmark for bona fide residency and for the assumption of minimal familiarity with local issues was "much too crude" since there were less intrusive ways of determining bona fide residency and since duration was at best only marginally related to familiarity. 405 U.S. at 359.

87. In various forms, the Court recognized the existence of fundamental rights in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), and Roe v. Wade, 410 U.S. 113 (1973), each of which invalidated laws that did not minimize state interference with marital and family decisions, and in Wisconsin v. Yoder, 406 U.S. 205 (1972), and Stanley v. Illinois, 405 U.S. 645 (1972), each of which invalidated state laws that infringed first amendment freedoms without a compelling state interest.

88. 411 U.S. 1 (1973).

89. *See* text accompanying note 77 *supra*.

90. 411 U.S. at 33-34.

91. *Id.* at 35.

92. "A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." *Id.* at 40. While some benefited more than others under the Texas plan, since "the thrust of the Texas system is affirmative and reformatory . . . , [it] should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution." *Id.* at 39. The district court had not only held that education was a fundamental right, but had also asserted that the Texas system, which resulted in higher per student expenditures in wealthy districts than in poor districts, used wealth as a suspect classification. *See* note 131 *infra*. The Court rejected both holdings, but its deference to the state in the field of education is strange in light of Brown v. Board of Educ., 347 U.S. 483 (1954) and Cooper v. Aaron, 358 U.S.

capable impression that *Skinner v. Oklahoma*,[93] *Reynolds v. Sims*,[94] and *Shapiro v. Thompson*[95] had been overruled, the Court simply concluded that procreation, voting, and interstate travel were protected implicitly by the Constitution and therefore were entitled to retain fundamental status.[96]

Prior to *Dandridge* and *Rodriguez*, the Court's working definition seemed to label as fundamental any interest or activity whose unfettered enjoyment had become essential to life in American society.[97] However, the dynamic concept of essentiality was rendered static in *Rodriguez* when the Court defined what is essential in eighteenth century terms. *Rodriguez* might be seen as laudable judicial restraint and even as sound constitutional interpretation in that the Court rejected the concept of the judiciary being a continuing constitutional convention whose job it is to keep rights "up to date." But it must be noted that the Court's explicit protection doctrine finds no support other than in *Dandridge*, and that its implicit protection notion is as potentially activist as any prior definition of fundamental rights. Since education is a significant building block for many other rights and interests,[98] the

1 (1958), wherein the Court held that education's status as a power reserved to the states did not lessen the fourteenth amendment's impact when invidious discrimination was involved.

93. 315 U.S. 535 (1942); *see* note 65 *supra*.

94. 377 U.S. 533 (1964); *see* note 68 *supra*.

95. 394 U.S. 618 (1969); *see* note 71 *supra*.

96. The reasoning the Court supplied to support its conclusions furnished little support. For example, "[t]he right to interstate travel had long been recognized as a right of constitutional significance . . . ." 411 U.S. at 32. This statement is accurate, *see* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867), but it parallels the Court's recognition in *Rodriguez* of "our historic dedication to public education," 411 U.S. at 30. If interstate travel was fundamental simply because it had "long been recognized" as important, should not education be fundamental for the same reason? Similarly, the Court found "constitutional underpinnings" indicating that the right to vote in state elections is implicitly recognized, *id.* at 33 n.74, and that the right of procreation is protected, *id.* at 35 n.76. These implicitly emanated from prior court decisions. Surely *Brown*, which recognized education's fundamental place, *see* note 67 *supra*, should be no less recognized than the cases the Court cites.

97. This definition closely approximates the standard adopted for determining which of the rights in the first eight amendments applied to the state via the fourteenth amendment. *See* Palko v. Connecticut, 302 U.S. 319 (1937). However, when the Court argued in Goldberg v. Kelly, 397 U.S. 254 (1970), that welfare payments were essential to the very existence of the recipient, but in Dandridge v. Williams, 397 U.S. 471 (1970), rejected welfare as not fundamental, the definition of a fundamental right obviously had changed. *See also* Lindsey v. Normet, 405 U.S. 56 (1972), in which the Court rejected the contention that "the 'need for decent shelter,' and the 'right to retain peaceful possession of one's home,' are fundamental interests . . . which may be trenched upon only after the State demonstrates some superior interest." *Id.* at 73.

98. *See* note 96 *supra*. Even if the Court's immediate intention was to contain the expansion of fundamental rights, it is obvious from the analysis in *Rodriguez* that almost anything could be categorized as implicitly protected:

> In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively . . . . A similar line of reasoning is pursued with respect to the right to vote . . . . We need not dispute any of these propositions.

Court's overall hostility to the fundamental rights doctrine is obvious.

This attack on the fundamental rights doctrine intensified when, in *Kras v. United States*[99] and *Sosna v. Iowa*,[100] the Court diluted its holdings in *Boddie v. Connecticut*[101] and the interstate travel cases.[102] In *Kras*, the Court held that conditioning access to bankruptcy court on the ability to pay a fee did not violate the fifth amendment.[103] The Court distinguished *Boddie* by arguing that since bankruptcy, unlike marriage, was not a fundamental right, the fee requirement was valid as long as it could withstand minimal scrutiny.[104]

In *Sosna*, the Court held that a state could close its divorce courts to those who had not been residents of the state for at least one year.[105] Although Iowa's requirement clearly infringed fundamental rights such as interstate travel and access to the judiciary, the Court argued that the state's interest was compelling. "With consequences of such moment [property and custody rights] riding on a divorce decree . . . [the state] may insist that one . . . have the modicum of attachment to the State required here."[106]

Both *Kras* and *Sosna* significantly vitiate *Boddie*. In *Kras*, the Court missed the point when it argued that bankruptcy was not a fundamental right.[107] The key to *Boddie*, despite its confusing language,[108] was that a fundamental right of access to courts exists when a

411 U.S. at 35-36. *See also* note 67 *supra*.

99. 409 U.S. 434 (1973).

100. 419 U.S. 393 (1975).

101. 401 U.S. 371 (1971). *See also* note 85 *supra* and accompanying text.

102. *See* note 71 *supra*.

103. 409 U.S. at 446. *Kras* involved both due process and equal protection challenges to a required $50 fee in order to file in federal bankruptcy court. Although the fifth amendment contains no specific equal protection clause, in Bolling v. Sharpe, 347 U.S. 497 (1954), the Court held that a notion of equal protection was implicit in the fifth amendment's due process clause. *Id.* at 449. When a right has been recognized as fundamental, the same compelling interest requirement is applicable to federal action as to state action.

104. 409 U.S. at 443. Citing Dandridge v. Williams, 397 U.S. 471 (1970), the Court held that since bankruptcy legislation was in the area of economics and social welfare, the controlling standard in appraising Congress' classification is that of rational justification. *Id.* at 446-48. The Court had no doubt that a congressional desire to "make the system self-sustaining" was rational. *Id.*

105. 419 U.S. at 408.

106. *Id.* at 409. The Court contrasted Shapiro v. Thompson, 394 U.S. 618 (1969) and Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974), the latter which held that statute requiring one year's residence in a county to be eligible for non-emergency hospitalization or medical care at county expense penalized the right to interstate travel without a compelling interest. In a unique application of the fundamental rights doctrine, the Court reasoned that since marriage was fundamental, a state's interest in opening its divorce courts to only bona fide residents must be compelling, since divorce touches a fundamental right. This was the first time that the fundamental rights doctrine became a rationale for upholding state power. 419 U.S. at 405-09.

107. 409 U.S. at 446-47.

108. *See* note 85 *supra*.

legal remedy is the only method of settling a dispute.[109] The Court's use of minimal scrutiny in *Kras* implies that access to courts is no longer a fundamental right.[110]

Similarly, *Sosna* not only sanctioned a law that denied access to courts but also ignored the chilling effect that a lengthy residency requirement had on interstate travel. While the state's interest in assuring that only bona fide residents use its divorce courts arguably might be compelling, the Court ignored the alternative means portion of the fundamental rights doctrine. Surely there existed in *Sosna* the same less intrusive means of assuring attachment to the state as the Court suggested in *Shapiro v. Thompson*[111] and *Dunn v. Blumstein*.[112] By ignoring the alternative means component, the Court arguably "defundamentalized" interstate travel.

Although *Rodriguez, Boddie*, and *Dunn* expressed the Court's grudging willingness to preserve the status quo in the fundamental rights area, *Kras* and *Sosna* began the retreat. The decision in *Holt Civic Club v. City of Tuscaloosa*[113] illustrates that little of the fundamental rights doctrine remains at present.

Alabama law[114] automatically placed unincorporated communities that were within three miles of certain municipalities under a vari-

109. *See* 401 U.S. at 370.

110. Incredibly, in *Kras*, the Court argued that bankruptcy was not the only method open to the bankrupt because he could meet with his creditors and negotiate a compromise. Since the truly indigent bankrupt would be unable to negotiate such a compromise, it appears "that Congress may say that some of the poor are too poor even to go bankrupt." 409 U.S. at 457 (Stewart, J., dissenting). Using this logic, the Court could have held in *Boddie* that indigent couples have a remedy other than divorce: reconciliation. It is as reasonable for a state to want to make its divorce courts self-sustaining through the payment of fees as for Congress to want to make the bankruptcy system pay its own way by a similar method.

111. 394 U.S. 618 (1969).

112. 405 U.S. 330 (1972). *See also* note 86 *supra*. The Court has generally viewed as compelling a state's desire to insure bona fide residency as a prerequisite for services. Durational requirements per se are therefore not invalid as long as they are so narrowly drawn as to encompass both the state's interest and the fundamental rights involved. Thus, the desire to protect against welfare fraud and voter fraud in *Shapiro* and *Dunn*, respectively, justified the state's imposition of a *reasonable* residency requirement. However, Iowa's interest in *Sosna* is not apparent. What fraud was the state trying to prevent? Certainly, the stakes in a divorce could be high, *see* text accompanying note 106 *supra*, but bona fide residency is irrelevant to a court's ability to settle financial and custody matters. The Court's contention that a state has a compelling interest in "avoiding officious intermeddling in matters in which another State had a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack," 419 U.S. at 407, ignores the full faith and credit clause, U.S. CONST. art. IV, § 1. Iowa's decrees would have prima facie validity if Iowa was the state of domicile, and the Court has never defined domicile solely in terms of duration.

113. 439 U.S. 60 (1978).

114. ALA. CODE. tit. 11, § 11-40-10 (1975) (police); *id.* tit. 12, § 12-14-1 (municipal court); *id.* tit. 11, § 11-51-91 (licenses).

ety of that municipality's "police jurisdiction" ordinances.[115] To Holt, located within three miles of Tuscaloosa, this law meant that whatever police, health, and licensing ordinances Tuscaloosa adopted applied with equal force to Holt.[116] Holt residents argued that, since there were important substantive policy choices inherent in police, licensing, and health regulations, the due process and equal protection clauses of the fourteenth amendment required that Alabama either allow them to vote in Tuscaloosa elections or discontinue the extraterritoriality.

In a six to three decision, the Court upheld the Alabama scheme. The Court's analysis of prior voting rights cases revealed a fatal flaw in Holt's contention that it was being denied the fundamental right to vote: In every other voting rights case, "the challenged statute . . . denied the franchise to individuals who were physically resident within the geographic boundaries of the government entity concerned."[117] Only residents of Tuscaloosa were constitutionally entitled to vote there. Since plaintiffs were not residents of Tuscaloosa, the state law did not deny Holt residents anything to which they were constitutionally entitled. Without entitlement, no fundamental right was even involved, much less abridged. Under minimal scrutiny, the Holt plaintiffs failed to prove that extraterritoriality bore no rational relationship to any legitimate state purpose. The Court concluded that Alabama's scheme "was a rational legislative response to the problem faced by the State's burgeoning cities."[118]

The Court's analysis awarded to the imaginary lines a state draws on the map "a talismanic significance contrary to the theory and meaning of . . . past voting rights cases."[119] The Court ignored precedents involving voting and other interests which indicated that when a fed-

115. "The police jurisdiction in cities having 6,000 or more inhabitants shall cover all adjoining territory within three miles of the corporate limits, and in cities having less than 6,000 inhabitants and in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and a half. . . ." 439 U.S. at 61 n.1.

116. More than sixty separate Tuscaloosa licensing, building, public health, traffic, criminal, and miscellaneous ordinances applied in *Holt Civic Club. Id.* at 82 n.10 (Brennan, J., dissenting).

117. *Id.* at 68.

> No decision of this Court has extended the 'one man, one vote' principle to individuals residing beyond the geographic confines of the governmental entity concerned. . . . The imaginary line defining a city's corporate limits cannot corral the influence of municipal actions. A city's decisions inescapably affect individuals living immediately outside its borders . . . . Yet no one would suggest that nonresidents likely to be affected . . . have a constitutional right to participate in the political processes bringing it about.

Id. at 68-69.

118. *Id.* at 75. "Unincorporated communities like Holt dot the rim of most major population centers . . . and state legislatures have a legitimate interest in seeing that this substantial segment of the population does not go without basic municipal services. . . ." *Id.* at 94.

119. *Id.* at 81 (Brennan, J., dissenting).

eral right is involved, a state's political subdivisions are not dispositive of constitutional questions.[120] Moreover, the Court's focus on those imaginary lines trivialized the Holt claim. Obviously, Holt residents did not live in Tuscaloosa nor did they claim to live there. Yet by making residence a crucial point, the Court effectively foreclosed any meaningful inquiry into genuine constitutional problems with Alabama's system.

The proper inquiry in *Holt Civic Club*, which the Court reduced to a footnote,[121] was whether, in reality, Holt residents were governed by Tuscaloosa. Clearly, they were so governed in virtually every way meaningful to municipal life. Once this reality is recognized, two important constitutional principles become operative. First, "government without franchise is a fundamental violation of the due process clause."[122] Second, "the criterion of geographical residency . . . irrationally distinguishes between two classes of citizens . . . each governed by the city of Tuscaloosa,"[123] which is a fundamental violation of the equal protection clause. This means that the state would have to prove that extraterritoriality is motivated by a compelling interest that could not be achieved other than by denying Holt residents the franchise. However, the Court also trivialized these principles by holding that there was no constitutional violation because the important powers of taxing and zoning were exercised by the county, where Holt was fairly represented, and that the Alabama system was approved by the state legislature, where Holt also was fairly represented.[124]

120. "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." Reynolds v. Sims, 377 U.S. 533, 575 (1964). When there are no federal constitutional rights involved, a state's line-drawing is to be respected, Milliken v. Bradley, 418 U.S. 717, 741 (1974). When such rights are involved, political subdivisions are irrelevant. *See generally* Wright v. Emporia, 407 U.S. 451 (1972).

121. We do not have before us, of course, a situation in which a city has annexed outlying territory in all but name, and is exercising the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within its corporate limits . . . . [Tuscaloosa cannot exercise over Holt] the vital and traditional authorities . . . to levy ad valorem taxes, invoke the power of eminent domain, and zone property for various types of uses.

439 U.S. at 73 n.8.

122. *Id.* at 75.

123. *Id.* at 87 (Brennan, J., dissenting).

124. With regard to the state legislature's role, the Court had rejected the view that, by an affirmative vote, residents of a jurisdiction can waive their own constitutional right to fair representation or those of their fellow inhabitants. Lucas v. Colorado General Assembly, 377 U.S. 713 (1964). With regard to the county's role, it is hard to believe that because some admittedly important powers were being properly exercised, *see* note 121 *supra*, there was no justification for complaining about those that were being improperly exercised.

In *Holt Civic Club*, the Court seemed to acknowledge that voting is a fundamental right, but then destroyed this acknowledgement by attempting to demonstrate that this was simply not a voting case. Carrying the Court's logic to an extent that does not seem extreme, one wonders whether *Holt Civic Club* was not really a rejection of most of the voting rights cases which the Court attempted to distinguish. For example, would the Court now hold that residents of a malapportioned state legislative district will not be allowed to complain about that malapportionment if they are fairly represented at the county and/or municipal levels where many, but not all, important governmental powers are exercised? Such a hypothetical problem is not far removed from the posture of geographic sterility to which the Court adhered.

While it is correct, as a general principle, that "a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power,"[125] this principle is supposedly reduced by the fundamental rights doctrine. Perhaps Alabama could have proved that assuring quality services for residents of unincorporated areas was a compelling interest and that extraterritoriality was the method least intrusive on fundamental rights by which delivery of those services could be guaranteed. But if the fundamental rights doctrine retains any meaning, the state should have shouldered that burden of proof. The Court's refusal to use the compelling state interest test in *Holt Civic Club* means that the administrative convenience rationale that *Shapiro* and *Dunn* rejected[126] has now become an acceptable rationale for denying the franchise. Thus, voting is no longer a fundamental right.

SUSPECT CLASSIFICATIONS

As with state action and fundamental rights, the suspect classification doctrine was utilized, although not invented, by the Warren Court.[127] The doctrine emanates from, but has grown larger than, the notion that the equal protection clause's central meaning was the protection of blacks against governmental actions motivated by racial ani-

125. 439 U.S. at 71.

126. *See* notes 71 and 84 *supra*. The Court might be showing proper respect for democracy, *see* text accompanying note 124 *supra*, and for federalism, *see* text accompanying note 125 *supra*, but *Holt Civic Club* shows little respect for stare decisis and for the fundamental rights doctrine.

127. The Warren Court's focus was on race, *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (invalidating miscegenation laws); McLaughlin v. Florida, 379 U.S. 184 (1964) (invalidating racially based cohabitation restrictions); Brown v. Board of Educ., 347 U.S. 483 (1954) (invalidating dual school systems). The Warren Court rejected an opportunity to elevate sex to suspect status in Hoyt v. Florida, 368 U.S. 57 (1961) (sustaining a law that omitted women from jury lists unless they specifically requested otherwise).

mus.[128] While the *Slaughterhouse Cases*[129] sought to limit the clause's protection solely to blacks, the Court soon acknowledged that other victims of invidious governmental discrimination would also be heard.[130] However, race remained the only classification that was clearly suspect.[131] When government used a suspect classification, its action had to survive the same strict scrutiny as when a fundamental right was invaded.[132]

Aliens and the Burger Court

While fending off claims by women, illegitimate children, and the impoverished, the Burger Court elected to come to the aid of aliens. In *Graham v. Richardson*,[133] the Court held that aliens "are a prime example of a 'discrete and insular' minority for whom heightened judicial

128. This language was used in McLaughlin v. Florida, 379 U.S. 184, 192 (1964). *See also* Strauder v. West Virginia, 100 U.S. 303 (1880): "The words of the [fourteenth] amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored . . . ." *Id.* at 307-08.

129. 83 U.S. 36 (1873).

> We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

Id. at 81.

130. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), the reason that the equal protection clause applied to discriminatory enforcement of a safety law against Chinese was that enforcement resulted in invidious discrimination against persons in similar circumstances. This factor, rather than race per se, has become the cornerstone for adjudications under the equal protection clause.

131. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (state cannot restrict aliens from earning a living by fishing) and Oyama v. California, 332 U.S. 633 (1948) (law restricting land ownership and presuming that land in citizen's name but paid for by alien was held for alien benefit denies equal protection) suggested that laws based on alienage or national origin would be strictly scrutinized. The status of alienage as suspect, however, was not formally recognized until Graham v. Richardson, 403 U.S. 365 (1971).

Although suggesting that sex classifications had to pass more than mere minimal scrutiny, *see* Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975), a majority has never held sex to be a suspect classification. James v. Valtierra, 402 U.S. 137 (1971), and San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), made clear that wealth distinctions are not suspect. Like sex classifications, those based on illegitimacy have sometimes commanded an intermediate standard of review, *see* NJWRO v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 (1972), but not in all cases, *see* Mathews v. Lucas, 427 U.S. 495 (1976). The existence of an intermediate standard of review, between strict and minimal scrutiny, was suggested in Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Essentially, Gunther suggested that the Court should opt out of determining what is fundamental and what is suspect, and instead scrutinize legislation solely to determine whether the means adopted *substantially* further an *important* purpose. The Court used this terminology in Craig v. Boren, 429 U.S. 190 (1976), regarding sex, and in Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 (1972), regarding illegitimacy.

132. *See generally* text accompanying notes 66-75 *supra*.

133. 403 U.S. 365 (1971).

solicitude is appropriate."[134] Invalidating a blanket restriction against aliens receiving welfare, the Court could find nothing approaching a compelling governmental interest in limiting welfare benefits to citizens.[135]

Two years later, the Court struck down two state laws, one barring aliens from competing for permanent civil service positions, the other preventing aliens from practicing law. In the former, *Sugarman v. Dougall*,[136] the Court could find neither a compelling nor rational interest in closing all civil service positions to aliens, rejecting the contention that aliens as a group were not sufficiently familiar with American politics and practices to be effective civil servants.[137] In the latter, *In re Griffiths*,[138] the Court acknowledged the state's "undoubted interest" in assuring high professional standards for attorneys. However, there existed ways to maintain such standards without a total ban on aliens practicing law.

Dictum in *Sugarman*[139] noted a potentially significant situation. Certain important state responsibilities that are at the heart of the American political community could theoretically provide a governmental interest sufficiently compelling to justify a blanket ban on alien participation.[140] However, in *Griffiths*, decided the same day as *Sugarman*, the Court rejected an attempt to label practicing law as one of those important state responsibilities.[141] Since the lawyer's function in American society has come to bear a close substantive relationship to

134. *Id.* at 372.

135. Noting the existence of a special public interest doctrine prior to Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948), which recognized that where the public interest demands, a state may exclude aliens from certain activities, the Court argued that since aliens,

> like citizens pay taxes and may be called into the armed forces [and] may live within a state for many years, work in the state and contribute to the economic growth of the state. . . . [t]here can be no "special public interest" in tax revenues to which aliens have contributed on an equal basis with the residents of the state.

403 U.S. at 376.

136. 413 U.S. 634 (1973).

137. The decision, however, was a slight victory for aliens. The Court simply concluded that a ban such as this, reaching "various positions in nearly the full range of work tasks, that is, all the way from the menial to the policy-making," was too broad. *Id.* at 640. *But see* note 140 *infra*.

138. 413 U.S. 717 (1973).

139. 413 U.S. at 640.

140. *See* note 137 *supra*. Justice Rehnquist's dissent is interesting. He stated that, given the many constitutionally recognized distinctions between aliens and citizens, there is no "historical evidence as to the intent of the Framers, which would suggest to the slightest degree that it was intended to render alienage a 'suspect' classification, [or] that it was designed in any way to protect 'discrete and insular minorities' other than racial minorities . . . ." 413 U.S. at 650. However, in Trimble v. Gordon, 430 U.S. 762 (1977), Rehnquist accepted national origin as suspect, although viewing alienage as different from national origin classifications. While a distinction exists between the two, the Court in *Graham* seemed to regard them as identical.

141. 413 U.S. at 720.

the political community's existence, the Court's refusal to sanction a ban on aliens practicing law seemed to indicate that "the right to vote or to hold public office,"[142] as political activities, might be the only activities from which aliens as a class could be constitutionally barred.

The Right to Govern Doctrine

The limited notion of citizen-only occupations that *Sugarman* and *Griffiths* suggested, as well as alienage's status as a suspect classification, was short-lived. In *Foley v. Connelie*,[143] the Court upheld a New York law[144] barring aliens from becoming members of the state police force. Purporting to rely on the *Sugarman* dictum,[145] the Court reasoned that where certain matters "within a State's constitutional prerogatives"[146] were involved,[147] alienage classifications were not suspect.[148] Since the right to govern is reserved to citizens, the state could prohibit aliens from certain activities and occupations closely linked to the governing process if there existed a rational reason for doing so.[149] In *Foley*, the Court found that the police function called for a high degree of judgment and discretion that was basic to govern-

142. [W]e do not hold that, on the basis of an *individualized determination*, an alien may not be refused, or discharged from, public employment, even on the basis of noncitizenship, if the refusal to hire, or the discharge, rests on *legitimate state interests* that relate to qualifications for a particular position or to the characteristics of the employee.

413 U.S. at 646-47 (emphasis supplied).

As it turned out, the words "individualized determination" did not mean a case-by-case analysis in which competent aliens were permitted to participate and incompetent aliens were eliminated. Rather, they meant that in cases where the state had a legitimate reason for doing so, aliens as a class could be barred. This bizarre dictum, referred to as the *Sugarman* dictum, suggests that alienage is not suspect at all. *See* text accompanying notes 144-54 *infra*.

143. 435 U.S. 291 (1978).

144. N.Y. EXEC. LAW § 215(3) (McKinney 1972).

145. 413 U.S. at 646-47; *see* note 141 *supra*.

146. 435 U.S. at 297-300.

147. *Id.*

148. *Id.* at 296. "It would be inappropriate, however, to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny,' because to do so would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.' " *Id.* at 295. However, labeling alienage as suspect forced the state to clear the high hurdle before it could use such a classification because *Graham* eliminated all distinctions except those that were the only method of achieving a compelling interest.

149. This is not because our society seeks to reserve the better jobs to its own members. Rather, it is because this country entrusts many of its most important policy responsibilities to these officers. . . . The essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens.

Id. at 296-97. This may be an accurate statement of what enlightened public policy ought to be. It is a misstatement of the constitutional law in this area, however, which held that before a state could exclude aliens from participating in an activity, the state had to prove that exclusion was the only method by which its compelling interest could be achieved.

ment.[150] Therefore, a state police officer's job "is one where citizenship bears a rational relationship to the special demands of the particular position,"[151] thus allowing a state to permissibly bar all aliens.

Foley was a definite blow to alienage's status as a suspect classification and a clear departure from *Sugarman* and *Griffiths*. If citizenship becomes relevant whenever an occupation involves judgment and discretion, *Griffiths* was incorrectly decided. How can an alien possess qualities necessary to be an officer of the court but not an officer of the law? How can aliens be sufficiently trustworthy to defend the rights of persons accused of crime yet not possess the judgment and discretion needed to execute the laws? *Graham* labeled alienage as suspect precisely because classifications such as this are overinclusive.[152] *Foley* permitted states to presume that citizens are "more familiar with and sympathetic to American traditions,"[153] albeit this is the same type of presumption that *Sugarman* and *Griffiths* invalidated.

Foley appears to demonstrate the Court's unhappiness with *Sugarman*, *Griffiths*, and perhaps even with *Graham*. Whether purposefully or inadvertently, the Court in *Foley* misconstrued the *Sugarman* dictum. If aliens can be uniformly barred from certain activities under the suspect classification doctrine, it is only because the state has a compelling interest for doing so. Doctrine becomes a non sequitur when the Court holds that the doctrine only applies when inconsequential things are involved. The doctrine's purpose is to prevent government from basing its policies on unarticulable group characteristics. In *Foley*, however, the Court permitted precisely that behavior by the state when it decided that alienage is not suspect because the stakes are high and because strict scrutiny might have yielded a result at variance with the state's policy preference. Perhaps New York's police eligibility law could have passed both the compelling interest and

150. *Id.* at 298.

151. *Id.* at 300.

152. Assuming, *arguendo*, that the state's need for competent and loyal police officers is compelling, there is nevertheless no logical basis for the presumption that all citizens will possess better judgment and discretion, after training, than will all noncitizens. The state's true compelling interest is in eliminating disloyal or incompetent applicants from its police force. Presumably, the state has devised batteries of tests and procedures for background investigations that will shed light on fitness and competence. Possession of citizenship would be expected to be among the least reliable predictors of future performance. If alienage were not suspect, this expectation would be irrelevant because, under minimal scrutiny, the state is not required to select the best or even the most rational method of achieving a legitimate interest. However, alienage *is* suspect, so that even though marginally relevant or irrelevant classifications may represent the state's best guess as to who will be effective, they are simply not permissible.

153. 435 U.S. at 299-300.

alternative means tests; nevertheless, it should have been subjected to those tests or *Graham* should have been overruled.

The Court's assault on the suspect classification doctrine continued in *Ambach v. Norwick*.[154] New York prohibited aliens who were eligible for citizenship but refused to be naturalized from becoming public school teachers.[155] The Court upheld the statute, citing *Foley* and extending *Foley*'s conception of a variable suspect classification doctrine.[156] Since education is fundamentally important in a democracy,[157] and since teachers, regardless of attempts at objectivity, are important conduits of civic and social responsibility, teaching in a public school is an endeavor that lies at the heart of our institutions. Considered in this manner, teaching becomes the functional equivalent of being a police officer, so that the state can bar all aliens as teachers so long as it has a rational reason for doing so. The Court had little difficulty in finding that the state's interest in furthering educational achievement met the test of rationality, hence the ban on certain aliens was clearly valid.[158]

As in *Foley*, the use of the massively overinclusive classification is not a particularly rational method of assuring competence and loyalty. The Court does not explain why aliens in *Griffiths* were sufficiently competent and loyal to deal with important individual rights, while in *Norwick* aliens could be permissibly labeled as unable to teach and

154. 441 U.S. 68 (1979).

155. N.Y. EDUC. LAW § 3001(3) (McKinney 1970).

156. 441 U.S. at 74. *See generally* discussion in text at notes 144-53 *supra*.

157. The Court's opinion went to some lengths in order to characterize education as fundamental and analyzed in minute detail how critically important education is in American society. This is most curious, since the opinion is written by Justice Powell, who had gone to similar lengths in his opinion for the Court in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), *see* text accompanying notes 88-92 *supra*, endeavoring to counter the argument that education was a fundamental right.

158. 441 U.S. at 80. "Appellees, and aliens similarly situated, in effect have chosen to classify themselves. . . . They have rejected the open invitation extended to qualify for eligibility to teach by applying for citizenship in this country." *Id.* at 80-81.

The dissent noted many of the difficulties with this decision. First, New York permits aliens to teach under certain exigent circumstances, N.Y. EDUC. LAW § 3001(a) (McKinney 1978), permits aliens to teach while they are waiting for citizenship (although they may never get it), *id.* § 3001(3), permits aliens to teach in private schools, *id.*, which eighteen percent of the state's students attend, and permits aliens to sit on school boards, *id.* § 2590-c(4).

In this regard, New York's education statutes are a crazy quilt of conflicting regulations that probably fail to establish the rational basis requisite under minimal scrutiny. Second, the Court sanctioned the state's fundamental principle that it is better to have a bad teacher who is a citizen than a good teacher who is not. As with the policy in *Foley*, the "State will know how to select its teachers responsibly, wholly apart from citizenship, and can do so selectively and intelligently. That is the way to accomplish the desired result." 441 U.S. at 87-88 (Blackmun, J. dissenting); *see also* note 152 *supra*. Finally, "it is logically impossible to differentiate between this case concerning teachers and *In Re Griffiths* concerning attorneys." *Id.* at 88 (Blackmun, J., dissenting).

explain those rights.[159] *Norwick*, like *Foley*, sanctioned abandoning the suspect classification doctrine whenever an activity can be lumped together under the meaningless heading of government function.[160] While the Court has recently recognized that a classification can be variably suspect, depending on the reason for which it is used,[161] there is nothing variable about New York's motive in *Foley* and *Norwick*: State action is motivated by state animus toward the group singled out for disqualification. The Court's approval is a thinly veiled disapproval of alienage's status as suspect or, perhaps, disapproval of the suspect classification doctrine itself.

CONCLUSION

Whatever difficulties may arise in interpreting the Burger Court's philosophy in substantive areas such as debtors' rights,[162] voting,[163] and state regulation of access to various professions,[164] the three crucial areas of state action, fundamental rights, and suspect classifications portray a Court that is far from directionless in reversing the trend of rights protected under the fourteenth amendment. There is a curious egalitarianism to *Flagg Brothers v. Brooks*,[165] *Holt Civic Club v. City of Tuscaloosa*,[166] *Foley v. Connelie*,[167] and *Ambach v. Norwick*[168] which strips certain interests or groups of the special judicial attention that had previously been afforded. These decisions also represent a clear

159. "One may speak proudly of the role model of the teacher . . . . Are the attributes of an attorney any the less?" *Id.* (Blackmun, J., dissenting).

160. Cases such as *Sugarman, Griffiths*, Nyquist v. Mauclet, 432 U.S. 1 (1977) (aliens cannot be barred from receiving state educational benefits), and Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (aliens cannot be barred from being licensed as engineers), seemed to hold that alienage was suspect whenever it was used to deny earning a livelihood or sharing in government benefits. *See* note 149 *supra*. *Norwick* contradicted this impression.

161. *See, e.g.*, Regents of California v. Bakke, 438 U.S. 265 (1978), in which a majority of the Court concluded that a suspect classification might be permissibly used if its use were not motivated by animus toward the subject group. However, the sliding scale definition of suspect in *Foley* and *Norwick* is quite different since some degree of animus was present in each. Probably the most disturbing aspect of these two cases is that, after determining that strict scrutiny was not appropriate, the Court used no scrutiny at all. Since it appears that the Court was aware that there were rational reasons, but few compelling ones, for discriminating against aliens, it would have been more intellectually honest for the Court to drop alienage as a suspect classification and simply apply minimal scrutiny. While it is unlikely that any of the pre-*Foley* cases would have been decided differently under minimal scrutiny, it is nevertheless difficult to justify the holdings in *Foley* and *Norwick* under any equal protection standard.

162. *See generally* discussion in text at notes 37-46 *supra*.

163. *See generally* discussion in text at notes 114-25 *supra*.

164. *See generally* discussion in text at notes 136-59 *supra*.

165. 436 U.S. 149 (1978); *see* discussion in text at 42-46 *supra*.

166. 439 U.S. 60 (1978); *see* discussion in text at notes 113-25 *supra*.

167. 435 U.S. 291 (1978); *see* discussion in text at notes 143-53 *supra*.

168. 441 U.S. 68 (1979); *see* discussion in text at notes 154-58 *supra*.

rejection of the recent judicial philosophy that these groups and interests need extra protection in order to enjoy equal protection. For better or worse, the Court has returned much power to the states by seriously diluting three of the most important procedural mechanisms designed to protect civil rights.